

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Jose Abel Fierro,

Plaintiff,

v.

Charles L. Ryan, *et al.*,

Defendants.

No. CV 13-02173-PHX-JJT (BSB)

**ORDER**

Plaintiff, an inmate currently confined in the Arizona State Prison Complex-Lewis (ASPC-Lewis), brought this pro se civil rights case pursuant to 42 U.S.C. § 1983 regarding his medical care and the denial of his requests for protective custody (PC). (Doc. 46.) In an Order dated January 17, 2017, the Court granted summary judgment on Plaintiff's medical care claims in Counts Two through Four and denied summary judgment on Plaintiff's PC claims in Count One. (Doc. 421.)

Pending before the Court is the remaining Defendants' Motion for Leave to File a Second Motion for Summary Judgment Regarding Count One of Plaintiff's Second Amended Complaint.<sup>1</sup> (Doc. 426.) Also pending is the Defendants' Motion for Extension of Time for Filing a Motion for Reconsideration. (Doc. 434.)

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<sup>1</sup> The remaining Defendants are Coffey, Forrester, Ochoa, Pruett, Sanders and Smith, whom the Court will refer to hereinafter as Defendants.

1 The Court will deny the Motion for Leave to File a Second Motion for Summary  
2 Judgment and will grant the Motion for Extension of Time, but will only permit  
3 Defendants five days from the date of this Order to file a Motion for Reconsideration.

4 **I. Background**

5 In the Order denying summary judgment, the Court outlined Plaintiff's seven  
6 requests for PC made between January 27, 2011 and December 26, 2013. (Doc. 421 at 5-  
7 16.) Plaintiff made his first PC request in January 2011 while housed in the ASPC-Lewis-  
8 Rast Unit, his second PC request in March 2012 while housed in the ASPC-Tucson-  
9 Cimarron Unit, his third PC request in April 2012 while housed in the ASPC-Lewis-  
10 Morey Unit, his fourth PC request in May 2012 while housed in the ASPC-Yuma-Dakota  
11 Unit, his fifth PC request in June 2012 while housed in the ASPC-Winslow-Kaibab Unit,  
12 his sixth PC request in September 2013 while housed in the ASPC-Tucson-Cimarron  
13 Unit, and his seventh and final PC request in December 2013 while housed at the ASPC-  
14 Lewis-Morey Unit. (*Id.*) The first six requests for PC were denied, but inmates were  
15 added to Plaintiff's Do Not House With list, and Plaintiff was given alternate placement  
16 and moved to a different unit each time. (*Id.*) Plaintiff made his seventh PC request after  
17 he was assaulted upon his arrival at the ASPC-Lewis-Morey Unit on December 26, 2013.  
18 (*Id.* at 15.) Plaintiff was eventually granted PC and transferred to a PC unit on April 4,  
19 2014. (*Id.* at 16.)

20 The Court found the evidence supported that Plaintiff was subject to a risk of harm  
21 beginning in January 2011 at the ASPC-Lewis-Rast Unit after Plaintiff's cellmate, a  
22 member of the Border Brothers prison gang, called Plaintiff a "rat" and a "snitch," began  
23 shoving Plaintiff, and Plaintiff broke his hand in a fight with his cellmate. (*Id.* at 19.) The  
24 evidence also supported that the risk to Plaintiff continued into 2012 and 2013 after he  
25 was transferred to other units, including the ASPC-Tucson-Cimarron Unit, where he was  
26 assaulted, and after that when he received threats at the ASPC-Lewis-Morey Unit, the  
27 ASPC-Yuma-Dakota Unit, and the ASPC-Winslow-Kaibab Unit. (*See id.* at 19-20.) The  
28 Court further found there was a question of fact regarding whether Defendants were

1 aware of a substantial risk to Plaintiff's safety and whether they were reasonably justified  
2 in exposing Plaintiff to the risk of harm. (*Id.* at 20-25.)

3 Although Plaintiff's first six requests for PC were denied, Defendants argued that  
4 they "responded reasonably to the risk Plaintiff claimed that he faced each time he  
5 requested PC" and that they eventually placed Plaintiff in PC once they determined a  
6 credible threat against Plaintiff existed. (*Id.* at 24, quoting Doc. 294 at 15.) The Court  
7 found a question of fact whether the earlier decisions denying PC were reasonable.<sup>2</sup>  
8 (Doc. 421 at 25.) As an example of why the Court found a question of fact regarding the  
9 reasonableness of those denials, the Court noted that Plaintiff was transferred from the  
10 Cimarron and Morey Units in 2012 and given alternative placement in lieu of PC, but  
11 then he was returned to those same units in 2013, and he was assaulted within fifteen  
12 minutes of his arrival at the Morey Unit.<sup>3</sup> (*Id.*) The Court observed that Defendants did  
13 not explain why Plaintiff was returned to those units when he had been transferred out of  
14 those units the year before following investigations of Plaintiff's PC requests. (*Id.*)

15 On January 23, 2017, the remaining Defendants—Coffey, Forrester, Ochoa,  
16 Pruett, Sanders and Smith—filed their Motion for Leave to File a Second Motion for  
17 Summary Judgment. (Doc. 426.) Defendants state that they want to "specifically address  
18 the issues cited by the Court" in the Order denying them summary judgment. (*Id.* at 3.)  
19 They argue that they "only recommended or approved PC or alternate placement" for  
20 Plaintiff and "had no responsibility for or personal involvement in the decisions regarding  
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23 <sup>2</sup> Although the Court wrote there is a question of fact "whether the first six PC  
24 decisions were reasonable" (Doc. 421 at 25), the Court did dismiss, on statute of  
25 limitations grounds, the claim related to Plaintiff's first PC request made on January 27,  
26 2011. (Doc. 421 at 17.) Therefore, the question of fact actually relates to the five PC  
requests made between March 11, 2012 and December 4, 2013, when Plaintiff's sixth PC  
request was denied on appeal.

27 <sup>3</sup> During the 2012 PC process at the Morey Unit, Deputy Warden Schuster had  
28 actually recommended PC placement for Plaintiff, but that recommendation was not  
followed. (Doc. 421 at 10.)

1 the actual transfers of Plaintiff to other prison units, including the transfers of Plaintiff  
2 back to Cimarron and Morey.” (*Id.*) Defendants assert that their Statement of Facts only  
3 noted the units Plaintiff was transferred to “for the purpose of showing a complete  
4 timeline of events,” but they were not responsible for Plaintiff’s transfers. (*Id.* at 3 n.2.)  
5 Defendants want to provide declarations “from ADC officials that will clearly establish  
6 that Defendants were not responsible for Plaintiff’s transfers following the alternate  
7 placement recommendations and approvals” and that they were not responsible “for  
8 Plaintiff’s transfers back to units from where Plaintiff had previously been transferred  
9 after requesting protection.” (*Id.* at 4.) In addition to showing their level of involvement  
10 in Plaintiff’s PC requests, Defendants assert that the declarations “will establish that by  
11 recommending or approving alternate placement, Defendants did not disregard the risk”  
12 and that their “individual recommendations or approvals of alternate placement of  
13 Plaintiff were indisputably reasonable.” (*Id.*) Defendants argue that they were denied  
14 summary judgment “based primarily upon facts not in the record” and that a second  
15 motion for summary judgment “will distill and clarify the factual record and that it will  
16 be fully dispositive.” (*Id.* at 5.)

## 17 **II. Successive Summary Judgment Motions**

18 A district court may entertain renewed or successive motions for summary  
19 judgment. *Hoffman v. Tonnemacher*, 593 F.3d 908, 910-11 (9th Cir. 2010). In *Hoffman*,  
20 the Ninth Circuit Court of Appeals found that a successive summary judgment motion “is  
21 particularly appropriate on an expanded factual record.” *Id.* at 911-12 (finding that  
22 district court did not abuse its discretion when it permitted second summary judgment  
23 motion after a mistrial and where there were new facts and testimony beyond what was  
24 available at the time of the pretrial summary judgment motion). But district courts “retain  
25 discretion to ‘weed out frivolous or simply repetitive motions.’” *Id.* at 911 (citations  
26 omitted).

27 Many courts, including this one, have also permitted a second summary judgment  
28 motion when the court failed to address the merits of a claim or defense in the first

1 motion. *See, e.g., Larsgard v. Corizon Health, Inc.*, CV 13-1747-PHX-SPL (JFM), 2014  
2 WL 5340581, at \*11-12 (D. Ariz. Oct. 21, 2014) (allowing a second summary judgment  
3 motion regarding whether there was a policy or custom underlying the alleged  
4 constitutional violation because neither party presented evidence regarding a policy or  
5 addressed the issue; thus, the court did not address the merits of the policy claim); *Joki v.*  
6 *Rogue Cmty. College*, 1:08-CV-849-PA, 2014 WL 4924672, at \*1 (D. Or. Sept. 30, 2014)  
7 (finding a second summary judgment appropriate because the court did not previously  
8 address the merits of the plaintiff's equal protection claim).

### 9 **III. Discussion**

10 This is not a case where there are new facts that were not available at the time of  
11 the summary judgment motion or where the Court failed to address the merits of a claim  
12 or defense in the first motion. Defendants cite no authority requiring a district court to  
13 entertain a second summary judgment motion where the motion is based on previously  
14 available evidence. *See, e.g., Purchase Partners, LLC v. Carver Fed. Sav. Bank*, 09-cv-  
15 09687, 2013 WL 1499417, at \*7 (S.D.N.Y. Apr. 10, 2013) (“[t]he law is clear that it is  
16 improper for a party to file a successive motion for summary judgment which is not  
17 based upon new facts and which seeks to raise arguments it could have raised in its  
18 original motion”) (internal quotation marks omitted); *Armentero v. Willis*, 08-cv-02790,  
19 2013 WL 144253, at \*2 (E.D. Cal. Jan. 11, 2013) (declining to hear second summary  
20 judgment motion where the “‘expanded factual record’ that defendant claims to now have  
21 before it does not include any evidence that could not have been obtained and included in  
22 defendant’s first motion for summary judgment”).

23 Allowing Defendants to file a second summary judgment motion in order to  
24 reargue the reasonableness of their decisions where they did not succeed the first time  
25 would give them a second bite at the apple, thereby prejudicing Plaintiff, a pro se  
26 prisoner litigant. *See Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986)  
27 (noting that the value of summary judgment would be diminished if a party could amend  
28 the issues to be decided in the same case after that party lost on summary judgment);

1 *Doherty v. Portland Cmty. College*, CV-99-1375-ST, 2000 WL 33200560, at \*3 (D. Or.  
2 Nov. 15, 2000) (denying the plaintiff's motion for leave to file second summary  
3 judgment motion because it "would unduly prejudice [the defendant] and unfairly give  
4 [the plaintiff] the proverbial second bite at the apple").

5 Defendants appear to believe the Court based its denial of summary judgment on  
6 the fact that Plaintiff was returned to the Cimarron and Morey Units. The Court, though,  
7 used that as one example of why there is a question of fact regarding the reasonableness  
8 of their decisions to deny Plaintiff PC. (*See* Doc. 421 at 25.) Even if Defendants did not  
9 make the decisions to return Plaintiff to the Cimarron and Morey Units, Defendants did  
10 make the decisions to deny Plaintiff's five PC requests, which meant he remained in the  
11 general population wherever he was sent. The risk to Plaintiff, and which Plaintiff  
12 complained about throughout the PC process, was remaining in the general population.  
13 (*See, e.g.*, Doc. 295-2 at 21 (stating on 3-26-12 while at ASPC-Tucson-Cimarron Unit, "I  
14 can no longer go into a General Population yard"); Doc. 295-2 at 35 (stating on 4-27-12  
15 while at the ASPC-Lewis-Morey Unit, "It is readily apparent that 'Alternative Housing'  
16 or 'General Population' will not suffice"); Doc. 295-2 at 45 (stating on 4-5-12 while at  
17 the ASPC-Lewis-Morey Unit, "I do not feel safe in the general population any longer");  
18 Doc. 295-2 at 53 (stating on 6-6-12 while at the ASPC-Yuma-Dakota Unit, "I can no  
19 longer walk the General Population yard"); Doc. 295-3 at 2 (stating on 5-8-12 while at  
20 the ASPC-Yuma-Dakota Unit, "I feel not safe to be in (G.P.) General Population");  
21 Doc. 295-3 at 12 (stating on 8-13-12 while at ASPC-Winslow-Kaibab Unit, "DOC staff  
22 . . . keep on placing me in proximity to known enemies, the border brothers, gang, in  
23 General Population. "Alternative Housing" or "General Population" will not suffice.");  
24 Doc. 295-3 at 28 (stating on 10-28-13 while at the ASPC-Tucson-Cimarron Unit, "In the  
25 past I have had issues with [ ] and for leaving the yard 1-27-12. Yet, I am being forced to  
26 go back into General Population"). Therefore, the question of fact rests on whether it was  
27 reasonable for Defendants to deny Plaintiff's PC requests, which meant he remained in  
28 the general population.

1 Accordingly, the Court will deny Defendants' Motion to File a Second Motion for  
2 Summary Judgment.

3 **IV. Motion for Extension of Time**

4 On January 31, 2017, Defendants asked the Court to extend the deadline for filing  
5 a motion for reconsideration to fourteen days after the Court rules on their Motion for  
6 Leave to File a Second Motion for Summary Judgment. (Doc. 434 at 1.) Defendants  
7 assert that while they believe their Motion for Leave to File a Second Motion for  
8 Summary Judgment should be granted and will be dispositive, they are asking for an  
9 extension of time to file a Motion for Reconsideration, "out of an abundance of caution."  
10 (*Id.* at 1-2.)

11 Motions for reconsideration must be filed "no later than fourteen (14) days after  
12 the date of the filing of the Order that is the subject of the motion." LRCiv 7.2(g)(2).  
13 Because the Court's Order denying summary judgment to the remaining Defendants  
14 issued on January 17, 2017, any motions for reconsideration were due January 31, 2017.  
15 Defendants seek to more than double the time allowed for filing motions for  
16 reconsideration, but have not asserted a good basis for doing so. Accordingly, the Court  
17 will grant Defendants an extension of time, but will only permit Defendants to file a  
18 motion for reconsideration within five days of the date of this Order.

19 **IT IS ORDERED:**

20 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants'  
21 Motion for Leave to File a Second Motion for Summary Judgment Regarding Count One  
22 of Plaintiff's Second Amended Complaint (Doc. 426) and Defendants' Motion for  
23 Extension of Time for Filing a Motion for Reconsideration (Doc. 434).

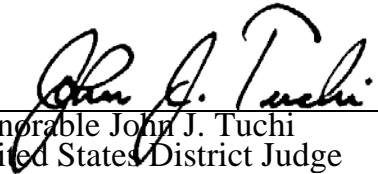
24 (2) Defendants' Motion for Leave to File a Second Motion for Summary  
25 Judgment Regarding Count One of Plaintiff's Second Amended Complaint (Doc. 426) is  
26 **denied**.

27 (3) Defendants' Motion for Extension of Time for Filing a Motion for  
28 Reconsideration (Doc. 434) is granted to the extent that Defendants are permitted five

1 days from the date of this Order to file a motion for reconsideration. No further  
2 extensions to this deadline will be permitted.

3 (4) All other matters **must remain** with the Magistrate Judge for disposition as  
4 appropriate.

5 Dated this 8th day of February, 2017.

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8 Honorable John J. Tuchi  
United States District Judge  
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